MOTION FILED

FEB 18 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,

Petitioner,

vs.

JOHN DODGE,

Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMERICAN INSTITUTE OF MERCHANT SHIPPING FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOUIS J. GUSMANO
120 Broadway, Room 3161
New York, New York 10005

Attorney for American Institute of Merchant Shipping as Amicus Curiae.

KIRLIN, CAMPBELL & KEATING
JOHN R. GERAGHTY
Of Counsel

BLEED THROUGH

INDEX

PAGE

Motion of American Institute of Merchant Shipping for leave to file brief as *amicus curiae* in support of petition for a writ of certiorari 1

Brief of American Institute of Merchant Shipping as *amicus curiae* in support of petition for a writ of certiorari 5

Interest of American Institute of Merchant Shipping .. 5

Reasons for granting the writ 7

CONCLUSION 9

TABLE OF AUTHORITIES

Statutes:

Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905, as amended Oct. 27, 1972, Publ. L. 92-576, § 18 (a) 86 Stat. 1263) 6

Cases:

A/S Arcadia v. *Gulf Insurance Company,* Supreme Court No. 75-646, October Term, 1975, decided *sub nom. Landon* v *Lief Hoegh and Co., Inc.,* 521 F.2d 756 (2d Cir. 1975) 7, 8

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,

Petitioner,

vs.

JOHN DODGE,

Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMERICAN INSTITUTE OF MERCHANT SHIPPING FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This motion is respectfully submitted on behalf of The American Institute of Merchant Shipping (referred to as AIMS) for leave to file the within brief *amicus curiae* in support of the petition for certiorari in the above matter. The petitioner has consented to the filing of an *amicus curiae* brief by AIMS in support of the petition for certiorari, but the respondent John Dodge has refused his consent.

The issues involved in this case are similar to the issues involved in *United States Lines, Inc.* v. *John Shellman*, in

which a petition for certiorari was docketed in this Court on February 9, 1976, No. 75-1058, October Term, 1975. AIMS is filing a brief *amicus curiae* in support of the petition for certiorari in the *Shellman* case upon the consent of all parties. The brief of AIMS in the *Shellman* case is substantially identical to the brief accompanying this motion.

AIMS was formed in January, 1969, by merger of three shipping associations: the American Merchant Marine Institute, the Committee of American Steamship Lines and the Pacific American Steamship Association.

AIMS represents the nation's largest association of American-flag shipowners, and is composed of over 30 companies operating over 400 ships in the foreign, coastal and intercoastal trades. These vessels represent about two-thirds of all active privately owned ships registered under the United States flag and aggregate over 8 million deadweight tons. The members of AIMS include Alaska Hydro-Train, Amerada Hess Corporation, American Export Lines, Inc., American President Lines, Ltd., Amoco Shipping Company, Atlantic Richfield Company, Chevron Shipping Company, Delta Steamship Lines, Inc., Dover Shipping Company, El Paso LNG Company, Exxon Company, U.S.A., Farrell Lines Incorporated, Gulf Oil Trading Company, International Ocean Transportation Corporation, Interstate Oil Transport Company, Keystone Shipping Co., Lykes Bros. Steamship Company, Inc., Marine Transport Lines, Inc., Mobil Oil Corporation, Moore McCormack Lines, Inc., National Bulk Carriers, Inc., Phillips Petroleum Company, Prudential Lines Inc., States Steamship Company, Sun Transport, Inc., Texaco, Inc., Trinidad Corporation, Union Oil Co. of California and United States Lines, Inc.

BLEED THROUGH

As revealed by the accompanying brief, this matter involves important interpretations of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901 et seq.). The questions involved affect the legal relationships among harbor workers, their employers and shipowners throughout the United States. We submit that the entire United States maritime industry has a substantial interest in obtaining a definitive ruling by this Court on the issues presented in this case and in the *Shellman* case.

The members of AIMS, our nation's largest association of American-flag shipowners, therefore, have a substantial interest in the outcome of this petition for certiorari. If certiorari is granted in this case and in the *Shellman* case, AIMS will seek permission to file briefs *amicus curiae* on the merits, in order to provide the Court with the benefits of the views of the United States shipping industry concerning these important questions of maritime law.

Accordingly, it is respectfully requested that this court allow AIMS to file the accompanying brief *amicus curiae*, in which it more specifically delineates the compelling need of the shipping industry for a final determination by this Court of the crucial issues involved.

Dated: New York, New York
February 17, 1976

Louis J. Gusmano
Attorney for American Institute of Merchant Shipping as Amicus Curiae

Kirlin, Campbell & Keating
John R. Geraghty
Of Counsel

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,

Petitioner,

vs.

JOHN DODGE,

Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Interest of American Institute of American Shipping

Amicus Curiae, American Institute of Merchant Shipping, referred to as AIMS, is a voluntary association which was formed in 1969 by merger of three shipping associations—the American Merchant Marine Institute, the Committee of American Steamship Lines and the Pacific

American Steamship Association. It represents the nation's largest association of American flag shipowners.

AIMS and its members, composed of over 30 companies operating over 400 ships registered under the U. S. flag, respectfully submit that the issues involved in *Mitsui Shintaku Ginko K.K., Tokyo* v. *John Dodge and Brady-Hamilton Stevedore Co.*, No. 75-1058, October Term, 1975 and its companion case, *United States Lines, Inc.* v. *John Shellman*, No. 75-1121, October Term, 1975 decided by the Ninth Circuit at the same time on November 21, 1975, are of real and vital concern to the shipping industry.

These cases involve a recurrent controversy which AIMS and its members have a strong interest in resolving. The members of AIMS are confronted with claims and suits involving the issues presented by *Dodge* and *Shellman*. These issues concern the effect of substantial negligence by a harbor worker's employer under the *Longshoremen's and Harbor Workers' Compensation Act* (33 U.S.C. § 905, as amended Oct. 27, 1972, Pub. L. 92-576, § 18 (a), 86 Stat. 1263) on (a) the harbor worker's recovery of damages against the shipowner; and (b) the negligent employer's recovery of compensation benefits paid to the harbor worker.

These issues necessarily involve construction of the 1972 amendments to the Longshoremen's Act. They have remained unresolved by this Court, although they surely will frequently recur in cases both in the Federal and State courts.

The Ninth Circuit below recognized the similarity of the issues presented in these cases, when it consolidated the cases for oral argument and decided them together. Accordingly, the brief by AIMS as *amicus curiae* in *Dodge* will not differ materially from the one filed in *Shellman*.

BLEED THROUGH

Filing of this brief *amicus curiae* was consented to by all parties in *Shellman* but in *Dodge* plaintiff-respondent refused to consent. This explains why the motion seeking leave to file the brief has been made in *Dodge* but not in *Shellman*.[1]

Reasons for Granting the Writ

AIMS concurs in the reasons given by petitioners in *Dodge* and *Shellman*, and by Pacific Merchant Shipping Association as *amicus curiae*, for the granting of the writ of certiorari. AIMS supplements these reasons below, and also advances additional reasons why certiorari should be granted.

The Ninth Circuit when it granted a preference to the hearings in *Dodge* and *Shellman* realized that they presented important issues which will recur. This was again impliedly affirmed in the *Shellman* decision where the Ninth Circuit allowed a voluntary dismissal of the employer's appeal although it presumed the case involved "a recurrent controversy which the public has a strong interest in resolving". (*Shellman* petitioner's appendix, p. A16). Denial of certiorari, which is not on the merits will not put these recurring issues to rest but will invite further litigation and appeals leading to petitions for a writ of certiorari in order to obtain a resolution on the merits. This is clearly indicated by the fact that petitions in several cases (not only the instant cases of *Dodge and Shellman*, but also in *A/S Arcadia*, discussed below), involving writs seeking certiorari based on these issues, have been filed in this October, 1975 Term.

On January 12, 1976 this Court denied certiorari in *A/S Arcadia* v. *Gulf Insurance Company*, No. 75-646 Octo-

[1] The stipulation consenting to the filing of the *amicus curiae* brief in Shellman is annexed as appendix A.

ber Term, 1975, decided by the Second Circuit *sub nom. Landon* v. *Lief Hoegh and Co., Inc.*, 521 F. 2d 756. *A/S Arcadia*, however, involved an interlocutory appeal, as the opinion of the Second Circuit states at 521 F. 2d at p. 763: "Appellant's second argument that the plaintiff may not recover against the shipowner unless he proves that the ship's negligence was *solely* responsible for his injury is strictly not before us on this interlocutory appeal." The only question directly presented to the Second Circuit was whether the stevedore or its insurer was an indispensable or necessary party pursuant to Rule 19 F.R.C.P. in the suit brought by the injured longshoreman against the shipowner (521 F. 2d at p. 761). The Second Circuit held that the litigation between the injured longshoreman and the shipowner could properly proceed in "the employer's absence" and that "complete relief can be accorded among those already parties" (521 F. 2d at p. 761); accordingly it held that the employer or its insurer was not an indispensable or necessary party. Obviously in *A/S Arcadia* there was no finding or even proof of negligence by the stevedore to any degree. Here, however, final judgments are involved, the negligence of the employers has been adjudicated and found to be a substantial factor in causing the injuries to the longshoremen. In *Dodge* and *Shellman*, the issues are squarely presented, therefore, as to whether the decisions of the Ninth Circuit have resulted in an inequitable apportionment of responsibility among the parties based on this adjudicated negligence.

The question raised by the Ninth Circuit as to the inequity in allowing a substantially negligent employer full recovery of its compensation payments also make the *Dodge* and *Shellman* cases particularly appropriate for review by this Court. This inequity was acknowledged in *Dodge* where the Ninth Circuit said at footnote 1:

BLEED THROUGH

> "It is indeed questionable whether it is equitable for the stevedore employer to recover the full amount of its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries". (*Dodge* petitioner's appendix, p. A 10).

Despite this inequity the Ninth Circuit believed it was obligated to follow language used by this Court in older cases which did not involve the 1972 amendments to the Longshoremen's Act, and which were decided before the right of full indemnity by the shipowner against the employer was abolished by the amendments. This Court should be the forum to make this pronouncement, and by granting certiorari it will be enabled to state authoritatively whether it intends the rationale of the prior decisions to remain the law under the new amendments even though the result proves inequitable.

CONCLUSION

It is respectfully submitted that the Court should grant the petition for a writ of certiorari.

Dated: New York, New York
February 17, 1976

Respectfully submitted,

Louis J. Gusmano
120 Broadway, Room 3161
New York, New York 10005

Attorney for American Institute of Merchant Shipping as Amicus Curiae.

Kirlin, Campbell & Keating
John R. Geraghty
Of Counsel

BLEED THROUGH

APPENDIX

BLEED THROUGH

LILLICK McHOSE & CHARLES
MICHAEL D. DEMPSEY
611 West Sixth Street, 28th Floor
Los Angeles, California 90017

213-620-9000

Attorneys for Defendant-Petitioner
United States Lines, Inc.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

JOHN SHELLMAN,

Plaintiff-Respondent

vs

UNITED STATES LINES, INC.

Defendant-Petitioner

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Plaintiff in Intervention

vs

UNITED STATES LINES, INC. and JOHN SHELLMAN,

Defendants in Intervention

STIPULATION FOR FILING OF AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties stipulate that the American Institute of Merchant Shipping may file an amicus curiae brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in JOHN SHELLMAN v. UNITED STATES

//

//

Appendix A

BLEED THROUGH

LINES, INC., No. 75-3071 vs. HARTFORD ACCIDENT & INDEMNITY COMPANY vs. UNITED STATES LINES, INC. and JOHN [illegible], No. 74-3058.

[illegible]
Attorney for Plaintiff

LILLICK McHOSE & CHARLES

By [illegible]
Michael D. Dempsey
Attorneys for Defendant

Robert Sikes
Attorney for Intervenor

Dated: January 23, 1976

POOR COPY